the way he did without the use of the income of her separate estate, and that this was known to his wife at the time. We need not refer to the cases upon this point, since they are of almost infinite variety, no two being alike precisely, and some of them seeming to be decided rather upon the principle of affording a support for the wife and family in the future, by placing a burden upon the husband's estate, which he never expected to bear, and which in justice to his creditors his estate ought never to bear. If the present case involved any such principle we should desire to state the reasons of our dissent more at length. But as no such question here arises, we shall content ourselves by protesting against its receiving any such application.

I. F. R.

Supreme Court of Montana.

THE TERRITORY OF MONTANA, PLAINTIFF AND RESPONDENT, *v.* 3000 FEET OF MINING GROUND, AND FOUK LEE, DEFENDANT AND APPELLANT.

The territories, even after being organized by Congress, possess none of the attributes of sovereignty. They cannot, therefore, enact laws for the forfeiture of lands of aliens.

The nature and extent of territorial governments discussed, their powers defined and explained.

THIS was an action brought under an act of the territorial legislature, entitled "An Act to provide for the forfeiture to the territory of placer mines held by aliens," Codified Statutes p. 593. The act substantially provides that no alien shall be allowed to acquire any title, interest or possessory or other right to any placer mine or claim, or to the profits or proceeds thereof in this territory, and that whenever it shall be made to appear to any district attorney, that any alien is in possession, occupation, use or enjoyment of any placer mine or claim within the district of such district attorney, or that any alien claims any right, title or interest in or to any such mine or claim, by pre-emption, location, acquisition, or by gift, grant, bargain, sale, conveyance, transfer, assignment, lease or mortgage, it shall be the special duty of such district attorney forthwith, to institute in the District Court of the proper county, an action in the name of the territory, against such placer mine or claim for the forfeiture thereof to the territory. And the act further provides, that if upon the trial it shall be made to appear that the mine or claim in question is occupied, possessed or claimed by an alien, or that any right or interest therein, has

been sought to be conveyed to or vested in such alien, or in any one for his use or benefit, the court shall thereupon render a judgment of forfeiture to the territory of such mine or claim, of whatever right, title or interest the alien would have acquired had he been a citizen, and upon this judgment there shall be an execution and sale for the benefit of the territory, and the proceeds of such sale shall be paid into the territorial treasury for the use of the territory.

The complaint in this case set forth the necessary averments under this statute, alleging that the defendant Fouk Lee is an alien and a subject of the Chinese Empire, and that he purchased of one Stearns, and by virtue of such purchase now holds, claims, occupies and is possessed of 3000 feet of placer mining ground in the complaint described. There was a demurrer to the complaint which was overruled and judgment was rendered for the plaintiff, that the mining ground described in the complaint be forfeited to the territory and sold in pursuance of the provisions of the act aforesaid. From this judgment the defendant appealed to this court.

The opinion of the court was delivered by

WADE, C. J.—By this appeal we are called upon to determine the validity of the statute under and in pursuance of which the action was brought and prosecuted to judgment; and in making this investigation it will be convenient to inquire: First, what were the rights and disabilities of aliens in this territory prior to the enactment of this statute. Second, as to the power of the territorial legislature to enact a law of this character; and Third, Is the act in question in harmony with the Organic Act of the territory.

1st. As to the right of an alien to purchase and hold real property, it may be stated as a general principle deducible from the authorities, that alienage is a disability that can only be taken advantage of by the government, or the sovereign power in a state, and that the real property purchased by an alien does not vest in the government until office found, that is, until a proceeding before a jury to inquire as to the question of alienage, and until such inquiry by the government the alien is seised, and may protect and defend his property as a citizen, and may institute actions, and prosecute suits under the laws for this purpose, and that as to

sales and transfers of real estate by or to aliens, they stand upon the same footing as sales and transfers made by citizens, subject only to the right of the sovereign power of the government to institute proceedings to cause a forfeiture.

This proposition is sustained in 2 Blackstone 249, note 18, wherein it is asserted that the law as to purchases by aliens is shortly this, that the purchase vests the land in the alien, but subject to be divested out of him for the benefit of the Crown, by the finding of an inquisition in the Exchequer. An alien may be grantee in a deed, though his holding is precarious, for on office found the king shall have it by his prerogative: 2 Blackstone 293, note 14; Coke Litt. 2 b.; 5 Co. 52; 1 Leon 47.

"If," says Lord COKE (Co. Litt. 2), "an alien purchase houses, lands, tenements, or hereditaments, to him and his heirs, albeit he can have no heirs, yet he is of capacity to *take* a fee simple, but not to hold, for upon office found, that is, upon the inquest of a proper jury, the king shall have it by his prerogative, of whomsoever the land is holden, and so it is, if the alien doth purchase land and die, the law doth cast the freehold upon the king," but the estate purchased by an alien does not vest in the king until office found, until which time the alien is seised, and may sustain actions for injuries to the property: 5 Co. 52 b.; 1 Leon. 47; 2 Blackstone 293, note 10.

An alien may purchase lands and hold them against all the world, but the state, nor can he be divested of his estate even by the state until after formal proceedings called "office found." And until that is done, may sell and convey or devise the lands, and pass a good title to the same: 1 Wash. Real Prop. 50, and authorities there cited. An alien friend is entitled at common law, not only to take and hold real estate, until office found, but to maintain an action for its recovery in case of an intrusion by an individual: *Bradstreet* v. *Supervisors of Oneida Co.*, 13 Wend. 546. In the case of *McCreery's Lessee* v. *Allender*, 4 Harris & McHenry 409, the Supreme Court of Maryland decided that the title of an alien friend is good against everybody but the state, and that his right and possession could not be divested but by office found, or some act done by the state to acquire possession, and judgment was given for the plaintiff who was an alien and a British subject. See also *The People* v. *Folsom*, 5 Cal. 578.

This question has also been passed upon by the Supreme Court

of the United States: *Craige* v. *Leslie et al.*, 3 Wheaton 563, and the foregoing propositions fully and clearly sustained. Alienage then is not a disability that can be taken advantage of by a private individual, and as between citizen and alien, their titles are equally sacred and secure, and equally entitled to the protection of the law. Only the sovereign power of the state or government can demand forfeiture of an alien's property, and this authority proceeds from the right of self-protection which inheres in every government, giving it the power of self-preservation. But this is a great sovereign prerogative right, which belongs only to the supreme power in a state, and cannot be exercised by any subordinate, secondary or limited depositary of power. The authority to naturalize, and to impose disabilities upon aliens, belongs alone to sovereign power, and this leads us to the discussion of the second proposition concerning the sovereignty of a territory.

2. Does the territory of Montana possess the inherent sovereign power, necessary to enable it to cause the forfeiture to itself of the property of aliens situate within its territorial limits? and does it possess the power to forfeit to its own use and benefit, property that never belonged to the territory, in which the territory never had any interest, the title to which still remains in the United States, subject only to a possessory easement acquired by individuals by leave and license granted by the General Government? In other words, can the territory forfeit to its own use and thereby become the owner of property which the government in its liberality granted only to citizens, and to those who have declared their intention to become such, and if there is a forfeiture of this possessory title which the government has granted to individuals, does not the property forfeited necessarily revert back to the General Government, the original grantor? The solution of these questions necessarily leads to a discussion of the sovereignty of a territory under the Constitution and government of the United States. Before entering upon this subject, however, we wish to premise, by saying that, primarily, the General Government is the owner of all the soil within its territorial limits, and that it is the fountain and source from whence all title to the soil is acquired, and that by reason of this fact, the right of forfeiture vests in the sovereign power of the General Government, and the particular inquiry now is, are the organized territories belonging to the United States, clothed with this sovereign power?

What do we mean by the term sovereignty? It is the exercise of, or right to exercise supreme power, dominion, sway, and as applied to a state, it is the right to exercise supreme power, dominion, authority. Says Vattel in his treatise on the Law of Nations, "Nations or states are bodies politic; societies of men united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their mutual strength. Such a society has her affairs and interests; she deliberates and takes resolutions in common, thus becoming a moral person who possesses an understanding and a will peculiar to herself. From the very design that induces a number of men to form a society which has its common interests, and which is to act in concert, it is necessary that there should be established a public authority, to order and direct what is to be done by each, in relation to the end of the association. This political authority is the *Sovereignty.*" And this *sovereignty* we may add is the elemental prerogative of a nation; an essential attribute that gives to it being, life and character, and without which it can have no existence. Sovereignty makes a nation; it forms a state, and the lack of it makes a colony, a province, a dependence. Sovereignty implies the right to make laws, and to enforce them, and the laws it enacts cannot be modified, altered or abolished except by the same supreme power which enacts them. To this power belongs the authority to define the rights of persons, and it may regulate the manner and circumstances under which property is held, and may direct the modes of administering justice. To this power belongs the right to declare war; to raise and support armies; to make treaties of peace, and to use all necessary means to self-preservation and protection. Sovereignty then signifies independence, absolute freedom and liberty, and a superiority to, and exemption from every foreign or extraneous influence. Every nation, like every individual, possesses the inherent right of self-defence, and for this purpose it may use or destroy the property of its citizens, and to this power of a nation may be referred its right to make laws of escheat and forfeiture, providing when and under what circumstances property shall become forfeited to the state. The authority to enact laws of forfeiture is a sovereign prerogative, and belongs only to the supreme power of a nation. Is this sovereign power lodged in the territory of Montana? The region of country now included within the limits of this territory was acquired by the

United States from France by virtue of the Louisiana purchase in 1803. Out of this vast region, thus acquired, several states have been formed and admitted into the Union, while in the rest of this territory, temporary governments have been established by Congress preparatory to their admission as states. By what authority does Congress thus assume to exercise jurisdiction and control over the several territories belonging to the government? We might well argue that the right to acquire territory implied the right to govern it, and if there was no controlling law on the subject, it might be well said that if the United States has the right to purchase territory from a foreign power, it could, after the purchase, exercise absolute dominion and authority over the property so purchased; but we are not compelled to resort to any implied power in determining the source of authority over the territories. Section 3, Article 4, of the Constitution provides that Congress shall have power to dispose of, and make all needful rules and regulations respecting the territories or other property belonging to the United States. Under and by virtue of this clause of the Constitution, from time to time, Congress has authorized and established temporary governments for the territories, the first of which was provided by the Ordinance of 1787, and afterwards adopted by Congress, and from thence continuously until the present time. The governments thus established were and are temporary in their character, and only designed to subserve a temporary purpose. These governments were, and now are, and at all times have been, under the complete control of Congress, and subject to abolition, modification or change, at the behest of the power which created them, and the laws enacted by the territorial legislatures are alike subject to modification or repeal by the action of Congress. These inherent infirmities in the governments and legislative enactments of the territories, at once rob them of all the essential attributes of sovereignty, and make them provinces over which the United States exercises supreme control. Under and by virtue of this clause of the Constitution above recited, Congress could sell and dispose of a territory to a foreign power, and not only can it make all needful rules and regulations concerning the territories, but can also abolish them, and the rules and regulations made by Congress are enacted laws, and congressional rules for the territories can be made in no other manner. With these sovereign powers residing in the General Government,

it seems idle to contend that a territory is sovereign and supreme in any department of its authority. These views and principles seem to be well supported by authority. Chancellor KENT, commenting upon the territories belonging to the United States, says, Vol. 1, p. 427, "with respect to the vast territories belonging to the United States, Congress have assumed to exercise over them supreme powers of sovereignty; exclusive and unlimited power of legislation is given to Congress by the Constitution and sanctioned by judicial decision. * * The general sovereignty existing in the government of the United States over the territories is founded on the Constitution, which declared that Congress should have power to dispose of and make all needful rules and regulations respecting the territories. * * * It would seem from these various Congressional regulations of the territories belonging to the United States, that Congress have supreme power in the government of them, depending upon the exercise of their sound discretion."

The government of the United States, which can acquire territory by conquest, must as an inevitable consequence possess the power to govern it. The territories must be under the jurisdiction and dominion of the Union, or be without any government; for the territories do not when acquired become entitled to self-government, and they are not subject to the jurisdiction of any state. They fall under the power given to Congress by the Constitution: *American Ins. Co.* v. *Carter*, 1 Peters 511. In the same case, Chief Justice MARSHALL says, that Congress legislating for the territories, exercises for them the combined powers of the general and state governments. Neither can it be said that Congress in giving to the territories an Organic Act, delegates any of its sovereign authority, for not only can the Organic Acts be altered or abolished, but all laws made under and by virtue thereof, by the territorial legislatures are subject to Congressional supervision, showing that sovereignty alone resides with Congress.

It may, however, be said that a territory is a distinct political society, and therefore sovereign in its action, except as limited by the Organic Act, as the states of the Union are sovereign, except as limited by the Federal Constitution. To this it may be answered that sovereignty does not abide with the territory for the reason that its action is subject to approval or disapproval by a higher authority, while Congress exercises and can exercise no authority

whatever over the enactments of a state legislature. To the people of a state in the Union, is secured the right of self-government, while the people of the territories have not this right, and depend for their government on the will of Congress. The state regulates its own internal concerns, while Congress directs the internal affairs of a territory. In a territory the courts have no final jurisdiction, an appeal being allowed to the Supreme Court of the United States in every case, only limited by the amount involved; the legislature acts with limited and contracted authority, and all its laws and statutes are subject to the approval or disapproval of Congress, and the power of the executive and the tenure of his office are likewise subject to the sovereign power and will of Congress and the President, and in nothing pertaining to the existence, organization or power of a territory is it sovereign and master of itself. The General Government may sell it to a foreign power; may abolish its government; may annex it to another territory, or may divide or change its form of government; the executive is the mere creature of the President and the Senate; its Organic Act creating a judiciary and a local legislature, may at any time be altered or abolished. Therefore it is, that a territory has no sovereign power or authority whatever, and hence has no authority to impose disabilities upon aliens within its limits, and much less has it the right to confiscate to its own use and benefit their property. Laws providing for the forfeiture of real estate, or any interest therein, while yet the title remains in the United States, and while if any forfeiture is had the property rightfully reverts to the original owner and proprietor, do not come within the scope of rightful subjects for territorial legislation; for legislation upon this subject, by every analogy, belongs exclusively to Congress. Before the passage of this act of the territorial legislature, forfeiting the property of aliens within the territory, the alien could hold, and did hold and enjoy the possessory title to mining claims, procuring such titles by purchase, which title was an easement therein, the remainder of the title belonging to the United States, so that the alien and the government taken together owned the complete title. The territory had no interest whatever in the claims held by aliens, or by any other persons, and no title or shadow of title thereto; but by the operation of this statute the territory becomes the owner of the possessory title which is, or may be the entire equitable interest, and

is authorized to sell the same for its own use, so that by the force of this statute, it becomes the owner of property in which it never had any interest, and which never belonged to it, and it forfeits the property of an alien and calls it its own, while if any forfeiture takes place for any reason whatever, the property thus forfeited necessarily belongs to the United States. The territory cannot acquire title to property, that does not and never did belong to it, so easily as this. There might be reason and plausibility in a statute of this kind providing the territory was clothed with sovereign power, and owned the paramount title to the property sought to be confiscated, but in the absence of sovereignty, and in the absence of any title or interest in the property, and while the General Government is yet the owner of the legal title, and while, if any interest in the property is forfeited, it naturally and rightfully reverts to the sovereign, the General Government, who holds the paramount title to all the property within its limits, it certainly is an unwarrantable exercise of power for the temporary government of a territory to undertake by forfeiture, to convert to its own use property which, if subject to forfeiture at all, should be forfeited to the government of the United States. Unquestionably Congress could enact and enforce a law similar in its provisions to the one under consideration, because it is clothed with the necessary power, and because the unoccupied lands in the territories belong to the government, and it has the right to say who shall possess such lands, and exercising this right by the Act of July 26th 1866, the government authorized citizens and those persons who have declared their intentions to become such to enter upon, explore and possess such unoccupied mineral lands, and if persons not authorized by this act, enter upon such lands, or if they acquire by purchase the possessory title to the same, and thereby the lands become subject to forfeiture, it is a matter for the General Government to take action in relation to, and in which the territory has no right, and no interest.

It will be observed that this Act of Congress does not prohibit citizens who rightfully acquire this possessory title, from selling and transferring the same to aliens, or to any other persons. But with no statute upon the subject, and by virtue of the common law, if an alien takes a title to a possessory right in any such lands, upon proper inquisition before a jury, or upon office found, such title could be forfeited to the government, and this sovereign right

belonging to the General Government, the sovereignty of the territories as to this matter is necessarily excluded. Only those persons authorized by the Act of July 26th 1866, are licensed to enter upon, explore and possess the mineral lands belonging to the United States. The persons given this right by virtue of this act, are citizens, and those who have declared their intention to become citizens. All others by necessary implication are excluded, and this exclusion would apply to a state, or a territory, as well as to an alien, and the very terms of the act that exclude aliens from entering, also exclude the territory from *holding* the possessory title to the mineral lands, and an action for forfeiture by the General Government against the territory in such case would be much more appropriate than such an action by the territory against an alien.

The territory lacks three essential elements necessary and requisite, in order to enable it to maintain this action, and in order to give validity to this statute. First, the sovereign power and authority to confiscate and forfeit to itself property, and especially property in which it has no interest and no title, the sovereignty of the United States and its title necessarily excluding any action by the territory. Second, the territory is not the party in interest, and is officiously meddling with what does not concern it; and Third, the inability of the territory under the Act of 1866, to take and to hold the possessory title to the mineral lands belonging to the United States.

It is argued that this statute of the territory does not conflict with the Act of Congress of 1866, which provides that only citizens and those who have declared their intention to become citizens, shall have the right to enter upon and possess the mineral lands; and that this statute confiscating the possessory title of aliens is only in aid of the Act of Congress. But it will be observed that the Act of 1866 does not authorize the forfeiture of the title of aliens, and if it did the forfeiture would take place to the United States, and the territory could take no action in the matter unless specially authorized by Congress. The territory is not called upon to aid Congress or the executive in the execution or enforcement of the laws of the General Government, and the voluntary aid of the territory is without authority, without reason and therefore void.

3. Is the statute in question in harmony with the Organic Act of the territory? The Organic Act provides, section 6, that the

territorial legislature shall pass no law interfering with the primary disposal of the soil. Notwithstanding the Organic Act, whereby a temporary government is created for the territory, the General Government, being the owner of the soil, still retains its ownership, and has made all the necessary laws and regulations, directing how its property shall be disposed of, and how title thereto shall be conveyed. The territory can enact no valid law, that in any manner impedes, modifies or varies the operation of the laws of the General Government as to the disposal of its lands. Neither can the territory do, by indirection, what it is prohibited from doing directly, so that if any territorial statute enacted for a local, or for a temporary purpose, in its workings, in its operations and effects, defeats the laws of Congress as to the disposal of the public lands of the territory, such statute is necessarily void. The statute in question provides that the mining claims held by aliens shall be forfeited to the territory, so that the territory becomes the owner of the possessory title to such claim. Laying aside the fact that the territory thus becomes the owner of property that does not belong to it, yet it obtains possession of the title, and this possession necessarily interferes with the disposal of the soil by the United States to the citizen or settler.

If the possessory title is forfeited, the property should again become subject to location by the persons entitled to make such location, but the territory comes forward and says by its legislature "that although the title to this property is forfeited and it thereby becomes subject to entry and location, yet I have acquired this property, and if any one obtains possession of it, they must purchase of me." The territory thus acquires a possessory title in violation of the Act of 1866, and in direct violation of the Organic Act, for the title of the territory interferes directly with the primary disposal of the soil to the citizen by the General Government. It does not require argument or authority to demonstrate, that if the territory holds possession of mining claims, it interferes with the acquisition of possession by the citizen, and thereby interferes with the disposal of the soil: and the fact that the territory is authorized to sell its possessory title by causing an execution to issue, does not help the matter, for by this means, the primary disposal of the soil is transferred from the General Government to the territory. This statute is in conflict with the Organic Act.

The Act of Congress of May 10th 1872, "to promote the de-

velopment of the mining resources of the United States," in its spirit and intention is in direct conflict with the territorial statute under which this action was brought. The Act of Congress referred to, after defining the mode and manner by which titles to the mineral lands may be acquired, and providing when and to whom patents may be issued, enacts that "nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent, for a mining claim, to any person whatever;" that is to say, after the citizen, or those who have declared their intentions to become such, shall have acquired title to their mining ground from the government by patent, they shall have the right to sell the same to any person, be he alien or citizen, Chinaman or American. If the absolute title can be thus conveyed to an alien, it would be strange indeed if the mere possessory title or right could not likewise be conveyed to the same individuals. If the alien is made capable by the General Government of holding the highest title, by what process of reasoning do we arrive at the conclusion, that the territorial legislature can say that if he acquires a mere possessory title it shall be forfeited? It was clearly the intention of Congress by the Act of May 1872 to authorize and permit the citizen who had obtained a patent to his mining ground, to sell the same to aliens if he so desired, thereby to aid the development of our mineral resources, by the use of foreign capital; and as long as this act remains in force, there can be no reason or validity in or to, a territorial statute subjecting the inferior titles of aliens to forfeiture and confiscation, while their absolute titles are made sacred by the act of the General Government.

The judgment below is reversed and the cause remanded.

We have read the foregoing opinion with interest. It unquestionably contains a great deal of valuable information upon the subject of territorial governments. The learned judge might perhaps have added greater force to his opinion by omitting some of the more questionable arguments, and thus have brought his views within a much narrower compass. But there is certainly a great deal of valuable matter in the opinion, presented in a very acceptable form, and what one might object to another might regard as of chief value and importance.

For ourselves the fact that all territorial governments are always in a mere state of tutelage, subordinate in every function to the national government, possessing no attribute of sovereignty, affords the most satisfactory reason why no such statute as here attempted to be enacted by this territory can be upheld. It is perplexing enough to attempt to comprehend and define the true limits between the national and state sovereignty. But it is too absurd to have the territories putting in a claim for still another fraction of sovereignty, which in

all other governments almost has been regarded as entire and indivisible. The territorial governments, under the United States Constitution, are created for very narrow and limited objects. And it argues little comprehension of those objects and great misconception of their powers to find them attempting to fix the status of their inhabitants, in regard to the title of real estate, in which the territorial governments have no interest, and especially when by their organic law they are specially prohibited from legislating in regard to the same.

This controversy about race and color was no doubt intended to be put an end to by the recent amendments of the United States Constitution; and it is not a little humiliating to find so many of our well-informed people, upon other questions, so little able to comprehend that a Chinaman is as much a member of the great family of man, and as such entitled to kindness and consideration, as an African or his descendants, or any other race. And the attempt to measure our humanity or charity by the rule of citizenship or alienage is but restoring the old rule that all foreigners are barbarians. But we are in a good school, that of experience, where it is hopeful that we may all in time become wiser and more forbearing. I. F. R.

Supreme Court of Pennsylvania.

RHEEM v. CARLISLE DEPOSIT BANK.

A notice of protest delivered to an endorser on Sunday is void, and does not render him liable on the note.

The mere receipt by the endorser of the notice in a sealed envelope, even if told what it is, does not, without his saying or doing anything to mislead the notary, amount to a waiver of the irregularity.

Nor does the receipt of notice in that way on Sunday amount to a valid notice to him on Monday, though a new notice to him on that day would have been in time.

THIS was an action against the endorser of a draft.

The draft was protested December 30th 1870, for non-payment. The notices of protest were sent to the Carlisle Deposit Bank (the actual holder of the note), and received by it on the morning of December 31st 1870. Mr. Rheem, the defendant, lived in the same town. On the same evening on which the bank received the notice of protest, Lewis A. Smith, the teller of the bank, went to Mr. Rheem's house with a notice for him, but although meeting an adult member of the family, did not leave the notice nor give information as to the nature of his errand. On the next morning, Sunday, Mr. Smith called again at the house, and handed Rheem a sealed envelope containing the notice of protest, telling him that it was the "protest of the Leeds draft." Mr. Rheem did not